SUPREME COURT U. S.
FILED
JAN 23 1899
JAMES H. McKENNEY,
Clerk.

No. 94.

Brief of Dillon for Appt. Com

Supreme Court of the United States.

OCTOBER TERM, 1898, No. 94.

Filed Jan. 23, 1899.

JAMES L. UTTER and ELIZABETH B. VOORHIES,
Appellants,

vs.

B. J. FRANKLIN, Governor, C. P. LEITCH, Auditor, and C. M. BRUCE, Secretary, Loan Commissioners of the Territory of Arizona.

Motion to enter judgment nunc pro tunc.

Now comes the attorney for appellants in the above-entitled cause, and moves this Court for the entry of the judgment herein *nunc pro tunc;* and states the facts in this behalf to be as follows:

This cause was argued and submitted to this Court on or about December 12, 1898, briefs of counsel for both parties having been theretofore filed in due course. This Court thereupon considered the case on its merits and after deliberation this Court, on or about January 3, 1899, rendered its decision reversing the judgment of the Supreme Court of the Territory of Arizona, which was in favor of the defendants below, stating, directing and ordering in its opinion as follows:

"We are, therefore, of opinion that it was made the duty of the loan commissioners by these acts to fund the bonds in question, and that the order of the Su-

preme Court of the Territory must be *reversed*, and the case remanded to that Court for further proceedings not inconsistent with the opinion of this Court."

Citation was served in this case March 16, 1897, and the record filed in this Court April 8, 1897 (Record, p. 14).

The attorney for the appellants further states that Elizabeth B. Voorhies, one of the appellants, has died pending the appeal to this Court, to wit, on November 18, 1897, in proof whereof he submits the affidavit of Francis W. Coler, a copy of which is annexed, and the original whereof is filed herewith.

Wherefore, the attorney for the appellants prays this Court to enter its judgment of reversal herein as of a date prior to the said 18th day of November, 1897, the date of the death of the said Elizabeth B. Voorhies, and that the said judgment of reversal and the mandate of the court herein to the court below shall authorize and direct the Supreme Court of the Territory of Arizona to enter its judgment granting the mandamus sought by the appellants as of the term at which the said action was tried in the Supreme Court of the Territory of Arizona, or of some suitable date prior to the said 18th day of November, 1897, to be determined and fixed upon by this court.

JOHN F. DILLON,
Attorney for Appellants.

Argument.

Where a party dies after the commencement of the term, and while the cause is under consideration by the Court, it is the practice of this Court and other Courts, including the Court of Chancery in England, as a matter of course, to order the judgment or decree to be entered *nunc pro tunc* as of the first day of the term or of a date prior to the death of the party.

Clay vs. Smith, 3 Pet., 411.
Bank of United States vs. Weisiger, 2 Pet., 351, note. The defendant having died

during the term, the Court ordered the decree to be entered as of a day before his decease (p. 481).

Griswold vs. Hill, 1 Paine, 483.
Campbell vs. Mesier, 4 John. Ch., 334, 342.
Davies vs. Davies, 9 Vesey, 461.

A similar motion in all respects was made and granted in the case of *Redfield vs. Parks*, 132 U. S., 239, 252, said motion, however (like this one), having been made and granted after the decision of the case on the merits, is not there reported.

DANIELL states the practice as follows (2 DANIELL'S *Chancery Pleadings and Practice*, *1017):

"An order to enter a decree or order *nunc pro tunc* may be obtained upon application *by motion, of course*, or by petition, of course, at the Rolls, and when passed must be left with the entering clerk at the Registrar's office as his authority to enter the decree or order."

This Court also in similar cases directs the lower Court to enter its judgment or decree *nunc pro tunc*.

Clay vs. Smith, 3 Pet., 411.
Bank of United States vs. Weisiger, 2 Pet., 331, note.
Redfield vs. Parks, *supra*.

Copy of Affidavit Referred to in the Foregoing Motion.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898, No. 94.

JAMES L. UTTER and ELIZABETH B. VOORHIES,
Appellants,

AGAINST

B. J. FRANKLIN, Governor; C. P. LEITCH, Auditor, and C. M. BRUCE, Secretary, Loan Commissioners of the Territory of Arizona.

Affidavit.

STATE OF NEW YORK, }
County of New York, } ss.:

I, FRANCIS W. COLER, being duly sworn, do state that I knew Elizabeth B. Voorhies, one of the appellants in the above-entitled case, in her lifetime; that the said Elizabeth B. Voorhies died on November 18, 1897; that she left a last will and testament, and that the executors of her will are George Albright, Wesley Albright and W. H. Maginnis. Further deponent saith not.

FRANCIS W. COLER.

Subscribed and sworn to before me this 19th day of January, 1899.

E. P. BICKNELL,
Notary Public,
N. Y. County.

[NOTARIAL SEAL.]

C. G. Burgoyne's Printing Business, 143-150 Centre St., N. Y.

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Brf. of Dillon for Appls. (on mo.)

Office Supreme Court U. S.
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JOHN F. DILLON,
Attorney for Appellants.

ARGUMENT.

When a party dies after the appeal has been perfected, and while the cause is pending in the Court, it is the practice of this Court and other Courts, including the Court of Chancery in England, on motion or as a matter of course, to order the judgment

or decree to be entered *nunc pro tunc* as of a date prior to the death of the party.

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Redfield vs. Parks, *supra*.

It makes no difference that in this case the said appellant Elizabeth B. Voorhies died prior to the commencement of the present term of the Court. Her death occurred long after the appeal was perfected to this Court, and long after the cause was fully before this Court, and the cause would have been reached for

hearing and argument before her death had it not been for the crowded condition of the calendar and the consequent delay of the Court in hearing the cause. This case, therefore, equally with the others above referred to, is within the maxim *actus curiæ neminem gravabit.*

The expiration of the 1896 term or of the 1897 term of this Court had no effect upon the standing of this case in this Court, for at the end of each of those terms this Court made an order continuing to the next succeeding term all the cases then in the Court and undecided. Such orders continued this case to the 1898 term of this Court, and the case was and is before the Court precisely as it would have been had the appeal been perfected during the 1898 term of the Court. This Court, therefore, has the power to enter its order *nunc pro tunc* as of *any date while the case has been in the Court for its consideration*, and may enter it as of some date prior to the 18th day of November, 1897, the date when Mrs. Voorhies died.

In other words, this Court, having continued the case from the 1896 term to the 1897 term, and again from the 1897 term to the 1898 term, and having now heard and decided this case, has as much power now to enter its decree *nunc pro tunc* as of some date prior to the 18th day of November, 1897, the date when Mrs. Voorhies died, as it would have had if the case had been reached for argument, and argued, and submitted for the Court's decision in the 1896 term or in the 1897 term. The power of the Court over the case is continuous and unbroken from the time the case enters the Court until it is finally decided and the mandate issued. There has been no hiatus, no interregnum, no break in the continuity of the jurisdiction.

Mr. FREEMAN states the principle and rule with regard to the entry of judgments *nunc pro tunc* as follows (*Freeman on Judgments*, 2d ed., sec. 56):

"Sec. 56. The policy of entering judgments and decrees, *nunc pro tunc*, is agreeable to the maxim '*actus curiæ neminem gravabit*'—'An act of the Court shall prejudice no one.' This maxim, says Mr. BROOM, 'is founded in justice and good sense, and affords a safe and certain guide to the administration of the law.' As an expression of the principle upon which judgments are given effect, as of some time prior to their actual entry, the maxim, in the interest of accuracy, requires to be changed to 'A delay of the Court shall prejudice no one,' and to be limited in its application so as to effect none but the parties litigant. The power of making an entry, *nunc pro tunc*, seems to have been possessed and exercised by courts of law and of equity from the earliest times. The period in which this power could be successfully invoked was never limited; a decree in one instance being entered after the lapse of twenty-three years. The practice was confined to those cases in which some hardship would be visited upon one of the parties without any fault of his, unless he was relieved from it by allowing his judgment to be entered at some period when he was legally entitled thereto, and of such a date as was necessary to avoid the embarrassment in which he would otherwise be involved" *(citing numerous cases)*.

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FRANCIS W. COLER.

Subscribed and sworn to before me this 19th day of January, 1899.

E. P. BICKNELL,
Notary Public,
N. Y. County.

[NOTARIAL SEAL.]